

Comments

Assessing the First Amendment as a Defense for WikiLeaks and Other Publishers of Previously Undisclosed Government Information

By JANELLE ALLEN*

Introduction

WIKILEAKS FIRST CAUGHT the public's attention in the United States in April 2010 with the release of the video "Collateral Murder," showing American soldiers shooting at unarmed civilians, two Reuters journalists, and children from an Apache helicopter.¹ The organization subsequently spurred a global debate regarding its "release of thousands of confidential messages about the wars in Iraq and Afghanistan and the conduct of American diplomacy around the world."² Continuing this trend of revealing previously undisclosed and embarrassing government information,³ WikiLeaks published 765 classified prisoner dossiers from the military prison at Guantanamo

* J.D. Candidate 2012, University of San Francisco School of Law; M.A., 2009 San Francisco State University; B.A., 2005 University of California, Santa Cruz. Thank you to my husband, Joe Allen, and my parents, Linda and Russ Hayes, for their infinite love and support in writing this Comment and throughout law school. I would also like to acknowledge Professor David Greene and the University of San Francisco Law Review staff, especially Gordon Kwan, for their efforts in preparing this piece for publication. Thanks also to Frank Drago and Amy Hennig for their thoughtful comments on previous drafts.

1. *Collateral Murder*, WIKILEAKS, <http://www.collateralmurder.com/> (last visited Jan. 9, 2012); Tim Arango & Elisabeth Bumiller, *For 2 Grieving Families, Video Reveals Grim Truth*, N.Y. TIMES, Apr. 7, 2010, at A8.

2. *WikiLeaks*, N.Y. TIMES, <http://topics.nytimes.com/top/reference/timestopics/organizations/w/wikileaks/index.html> (last updated Jan. 12, 2011).

3. This Comment will primarily use the general term "undisclosed government information." The sources cited in this Comment use other more specific terms such as "national security information," "confidential government information," and "classified government information," which all have their own distinct definitions. However, these

Bay, Cuba in April 2011.⁴ WikiLeaks' mission statement suggests that its activities provide a public service by exposing important, otherwise hidden information:

WikiLeaks is a non-profit media organization dedicated to bringing important news and information to the public. We provide an innovative, secure and anonymous way for independent sources around the world to leak information to our journalists. We publish material of ethical, political and historical significance while keeping the identity of our sources anonymous, thus providing a universal way for the revealing of suppressed and censored injustices.⁵

Nonetheless, some see the organization's lofty goal of transparency as posing a serious threat to U.S. national security.⁶ Vice-President Joe Biden called WikiLeaks founder Jullian Assange a "high-tech terrorist" because, through leaking U.S. documents, Assange has "put in jeopardy the lives and occupations of people in other parts of the world," and "[h]e's made it difficult to conduct our business with our allies and our friends."⁷ Further, Peter T. King, Chairman of the Committee on Homeland Security, commented, "Julian Assange and his compatriots are enemies of the U.S and should be prosecuted under the Espionage Act."⁸

Currently, the United States government has refrained from imposing criminal or civil liability on WikiLeaks for the disclosures; however, in December 2010, the Department of Justice ("DOJ") launched an investigation into its options for possible prosecution of WikiLeaks and Julian Assange.⁹ This investigation was announced in response to

specific terms collectively belong within the general category of "undisclosed government information."

4. *The Guantanamo Files: WikiLeaks Reveals Secret Files on All Guantánamo Prisoners*, WIKILEAKS, <http://wikileaks.org/gitmo/> (last visited Jan. 9, 2012) [hereinafter *Guantanamo Files*]; Greg Mitchell, *The WikiLeaks Blog: The Guantánamo Files*, THE NATION (Apr. 25, 2011, 7:18 AM), <http://www.thenation.com/blog/160135/wikileaks-blog-guantanamo-files> (tracking revelations by newspapers all over the world learned from the prisoner dossiers on the day the information was released).

5. WIKILEAKS, <http://wikileaks.de/> (last visited Jan. 9, 2012).

6. See Stephanie Strom, *Pentagon Sees a Threat from Online Muckrakers*, N.Y. TIMES, Mar. 18, 2010, at A18.

7. *Biden Makes Case for Assange as a 'High-Tech Terrorist'*, HUFFINGTON POST (Dec. 19, 2010), http://www.huffingtonpost.com/2010/12/19/joe-biden-wikileaks-assange-high-tech-terrorist_n_798838.html.

8. Press Release, U.S. House of Representatives Comm. on Homeland Sec., King Re-Introduces Bill to Strengthen DOJ Authority to Prosecute Leaks of Intelligence (Feb. 15, 2011), available at <http://homeland.house.gov/press-release/king-re-introduces-bill-strengthen-doj-authority-prosecute-leaks-intelligence>.

9. Charlie Savage, *U.S. Weighs Prosecution of WikiLeaks Founder, but Legal Scholars Warn of Steep Hurdles*, N.Y. TIMES, Dec. 2, 2010, at A18.

outcry from political leaders over the release of government cables about the Iraq and Afghanistan wars.¹⁰

The government's displeasure over these releases is evidenced by the detention of Private Bradley Manning. Manning, the soldier believed to have leaked the Collateral Murder video, Iraq War Logs,¹¹ and Afghan War Diaries,¹² has been held for nearly two years on "charges of handing government files to WikiLeaks[] [and] has not even been tried let alone convicted."¹³ Manning spent eight months in solitary confinement, and he is currently awaiting a court martial.¹⁴ The law is settled after *Garcetti v. Ceballos* that there is no First Amendment protection for government employees who leak previously undisclosed information.¹⁵ However, beyond extracting a confession

10. See Charlie Savage, *U.S. Prosecutors, Weighing WikiLeaks Charges, Hit the Law Books*, N.Y. TIMES, Dec. 8, 2010, at A10. Senator Joseph Lieberman stated, "I certainly believe that WikiLeaks has violated the Espionage Act, but then what about the news organizations—including *The [New York] Times*—that accepted it and distributed it?" *Id.* He continued: "To me, *The New York Times* has committed at least an act of bad citizenship, and whether they have committed a crime, I think that bears a very intensive inquiry by the Justice Department." *Id.*; see also Scott Shane, *Keeping Secrets WikiSafe*, N.Y. TIMES, Dec. 12, 2010, at WK1. "Representative Peter King, a New York Republican, has asked the State Department to consider designating WikiLeaks a terrorist group; Senator Dianne Feinstein of California, the Senate Intelligence Committee's top Democrat, has called for espionage charges against Mr. Assange, an idea that legal experts say is problematic." Shane, *supra*.

11. This release contained 400,000 classified U.S. documents about the Iraq War, leading at least one government oversight group to estimate that "around 15,000 previously unknown civilian deaths would be identified." *WikiLeaks: Iraq War Logs 'Reveal Truth About Conflict'*, BBC NEWS (Oct. 23, 2010), <http://www.bbc.co.uk/news/world-middle-east-11612731>. The Iraq War Logs provided the public with accurate data to chart the War's death toll. See Simon Rogers, *WikiLeaks Iraq War Logs: Every Death Mapped*, GUARDIAN DATA BLOG (Oct. 22, 2010, 7:05 PM), <http://www.guardian.co.uk/world/datablog/interactive/2010/oct/23/wikileaks-iraq-deaths-map>.

12. The Afghan War Diaries were a smaller scale release containing 90,000 documents that likewise revealed previously unreported civilian casualties. *WikiLeaks 'Afghan War Diary' Provides Ground-Level Account of Afghanistan War*, HUFFINGTON POST (July 25, 2010), http://www.huffingtonpost.com/2010/07/25/wikileaks-afghan-war-diary_n_658743.html. These documents were "reports from junior officers in the field that analysts use to advise policy-makers, rather than any high-level government documents that state U.S. government policy." *Id.*

13. Editorial, *The Abuse of Private Manning*, N.Y. TIMES, Mar. 15, 2011, at A34 (describing Manning's imprisonment conditions as "abusive").

14. Patrick Worsnip, *U.N. Torture Sleuth Urges End to Long Solitary Terms*, REUTERS (Oct. 18, 2011), <http://www.reuters.com/article/2011/10/18/us-un-torture-solitary-idUSTRE79H7HF20111018>.

15. See *Garcetti v. Ceballos*, 547 U.S. 410, 421 (2006) (holding that the First Amendment does not protect a public employee making statements pursuant to their official duties); see also Stephen I. Vladeck, *The Espionage Act and National Security Whistleblowing After Garcetti*, 57 AM. U. L. REV. 1531, 1540–41 (2008) (explaining that due to the Supreme Court's holding in *Garcetti*, government employees are completely unprotected constitu-

from Manning, what evidence the government will use to establish a link between Manning and Assange is unclear: “One major hole in the case against Assange is the lack of any evidence that Manning gave the information to Assange.”¹⁶

Furthermore, since publication of the leaked material was done in concert with the world’s top traditional media outlets, including the *New York Times*, *Der Spiegel*, *Le Monde* and *El País*,¹⁷ is there any logical way to distinguish these newspapers from WikiLeaks for the purpose of liability? There are some commentators who argue that they should be treated equally:

Assange arranged for these five principal world news organizations to be co-equal publishers with WikiLeaks. As such, they are co-equally guilty with Assange under the Espionage Act. To charge Assange and not charge, for example, *The New York Times*, would lead to devastating charges of unfairness both outside and inside the courtroom. As Assange is guilty, so are the five publications.¹⁸

Since First Amendment jurisprudence currently draws no distinction between individuals and the press,¹⁹ and as we will see, neither does the Espionage Act,²⁰ the argument for equal treatment is legally sound. Nonetheless, prosecution of the *New York Times*, one of the world’s most respected, traditional media outlets, seems unlikely given the potential political fallout. Attorney General Eric Holder suggested in a recent interview that the mainstream media would not face prosecution because they were not as culpable as WikiLeaks: “They acted, I think, in a responsible way so I think that is at least one of the distinctions[.]”²¹ While Holder believes the newspapers were less culpable because of their responsible behavior (thus far unsupported by facts),

tionally or statutorily for whistle blowing if they gained access to the relevant information as part of their professional duties).

16. James Ching, *Journalism WikiLeaks Style*, NAT’L L.J., Jan. 10, 2011, at 38.

17. Mark Thompson, *The Future of Journalism in the UK*, REUTERS MEDIAFILE (Sept. 26, 2011), <http://blogs.reuters.com/mediafile/2011/09/26/the-future-of-journalism-in-the-uk/>; Ravi Somaiya & Alan Cowell, *WikiLeaks Founder Said to Fear ‘Illegal Rendition’ to U.S.*, N.Y. TIMES, Jan. 12, 2011, at A6.

18. Ching, *supra* note 16.

19. See U.S. CONST. amend. I (“Congress shall make no law . . . abridging the freedom of speech, or of the press . . .”); DANIEL A. FARBER, *THE FIRST AMENDMENT* 206–07 (3d ed. 2010) (noting that the media tends not to receive special constitutional protection because (1) it would be difficult to provide a workable definition of the press; and (2) the Constitution should protect the individual just as much as the media).

20. Espionage Act, 18 U.S.C. §§ 792–799 (2006).

21. Mark Matthews & Lilian Kim, *Holder Talks WikiLeaks, Terror Stings in Bay Area Visit*, ABC7 KGO-TV (Dec. 11, 2010), <http://abclocal.go.com/kgo/story?section=news/politics&id=7837935>.

this is not the current legal test for liability and is merely a policy choice to treat WikiLeaks differently from other publishers.

Overall, this Comment seeks to answer whether WikiLeaks can and should be held liable for disclosing truthful information about a matter of public concern, though the information was originally unlawfully obtained. This question raises fundamental issues regarding the tension between the First Amendment and the Espionage Act. Furthermore, the WikiLeaks situation questions the press' ability to publish on matters of public concern that are also undisclosed government information. While recognizing that the law in this area is unsettled, this Comment asserts that the Supreme Court's recent decision in *Snyder v. Phelps*,²² which embraced the broad definition of "matters of public concern," read along with *Bartnicki v. Vopper*,²³ the most recent in the *Daily Mail* line of cases,²⁴ suggests a step toward categorical inclusion into First Amendment protection for all truthful information on a matter of public concern when the publisher innocently receives information illegally obtained by a third party.

This categorical approach would provide heightened First Amendment protection to all publishers on matters of public concern. Thus, given *Snyder* and *Bartnicki*, WikiLeaks has a plausible constitutional defense to civil and criminal liability for publication of leaked, previously undisclosed government information.

Part I of this Comment begins with a discussion of the policy debate over a publisher's freedom to disseminate facts about important public issues, including government secrets that are unlikely to result in immediate, irreparable harm. Part II analyzes two possible legal avenues for shutting down WikiLeaks: (1) prior restraint; and (2) the Espionage Act, specifically sections 793 and 798.

Part III outlines the *Daily Mail* principle, through the Supreme Court's reasoning in *Landmark Communications, Inc. v. Daily Mail Publishing Co.*, and *Florida Star v. B.J.F.* Part III also assesses this principle's effectiveness as a defense. This section also points out two post-*Bartnicki* cases decided by lower courts that frame the outer limits of a possible categorical inclusion for all innocent publishers: (1) *Peavy v. WFAA-TV, Inc.*, which applied intermediate scrutiny when the journalist participated in the illegal interception;²⁵ and (2) *United States v.*

22. *Snyder v. Phelps*, 131 S. Ct. 1207 (2011).

23. *Bartnicki v. Vopper*, 532 U.S. 514 (2001).

24. *Fla. Star v. B.J.F.*, 491 U.S. 524 (1989); *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97 (1979); *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829 (1978).

25. *Peavy v. WFAA-TV, Inc.*, 221 F.3d 158, 190–91 (5th Cir. 2000).

Rosen which held that the First Amendment is not a defense to criminal liability under the Espionage Act for lobbyists who received information they suspected or had reason to suspect was illegally shared by a government employee.²⁶

Part IV argues that First Amendment scholars and practitioners may use the expansive definition of what constitutes a matter of public concern in *Snyder v. Phelps* to widen the constitutional protection for politically relevant, unpopular speech. Part V juxtaposes *Snyder v. Phelps* with two “War on Terror” cases, *Holder v. Humanitarian Law Project*²⁷ and *Weise v. Casper*²⁸, and suggests that lower courts are reluctant to provide robust First Amendment protection for civilian speech directly dealing with the Iraq or Afghanistan wars—speech that is clearly a matter of public concern.

Finally, this Comment concludes by advocating for categorical constitutional protection for publishers of truthful and previously undisclosed government information of public importance when the publisher does nothing illegal, short of publication. If WikiLeaks is prosecuted for these leaks, the First Amendment should protect it from liability.

I. The Current Policy Debate Over Whether the Government Should Be Able to Prosecute the Press

Assuming WikiLeaks is considered a member of the press, does it offend the First Amendment to allow the government to civilly or criminally sanction the press for publishing previously undisclosed information? Historically, the government has more power over the press during times of war.²⁹ Nonetheless, the underlying rationale, that in times of war we must temporarily cede constitutional rights, makes less sense in the current context of the seemingly perpetual War on Terror.³⁰ If the United States is *always* at war and this status justifies censorship, then the public will be ill equipped for their vital role in our democracy.

26. *United States v. Rosen*, 445 F. Supp. 2d 602, 635–37 (E.D. Va. 2006).

27. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705 (2010).

28. *Weise v. Casper*, 593 F.3d 1163 (10th Cir. 2010).

29. *See Schenck v. United States*, 249 U.S. 47, 52 (1919) (“When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right.”).

30. The Afghan war holds the record as the longest American war. Thomas Nagorski, *Afghan War Now Country’s Longest*, ABC NEWS (June 7, 2010), <http://abcnews.go.com/Politics/afghan-war-now-longest-war-us-history/story?id=10849303>.

WikiLeaks is just the most recent example of the persistent debate between the public's right to access information and the government's desire for secrecy. For example, the government recently threatened the *New York Times* with Espionage Act liability for revealing the National Security Agency's ("NSA") domestic wiretapping program.³¹ Nonetheless, the *New York Times* story exposed the practice to public scrutiny and subsequently subjected it to congressional oversight.³²

On one side of the debate, WikiLeaks argues that the press should not be punished for making the government more transparent: "[T]ransparency in government activities leads to reduced corruption, better government[,] and stronger democracies. All governments can benefit from increased scrutiny by the world community, as well as their own people. We believe this scrutiny requires information."³³ Press freedom provides a valuable check on government authority given the press's outsider status: "When Congress is controlled by the party of the President and is not providing robust checks on executive power, the press's extra-legal and extra-constitutional reporting of questionable but secret government activity provides an especially important check on presidential overreaching."³⁴ Moreover, secrecy can be unhealthy in a democracy: "Secrecy in government is fundamentally anti-democratic, perpetuating bureaucratic errors. Open debate and discussion of public issues are vital to our national health. On public questions there should be 'uninhibited, robust, and wide-open' debate."³⁵ The press also plays an important role in educating voters about the inter-workings of government: "It is a truism that we cannot responsibly exercise our franchise unless we have sufficient knowledge about governmental affairs, operations, and policies to make informed choices"³⁶ Further, press reporting on national security information may actually help U.S. security by exposing flaws in the security infrastructure:

31. David Johnston, *Inquiry into Wiretapping Article Widens*, N.Y. TIMES, Feb. 12, 2006, § 1, at 26.

32. *Id.*

33. *WikiLeaks: About*, WIKILEAKS, <http://wikileaks.org/wiki/Wikileaks:About> (last visited Jan. 11, 2012); Eric Schmitt, *In Disclosing Secret Documents, WikiLeaks Seeks 'Transparency'*, N.Y. TIMES, July 26, 2010, at A11.

34. William H. Freivogel, *Publishing National Security Secrets: The Case for "Benign Indeterminacy"*, 3 J. NAT'L SECURITY L. & POL'Y 95, 95 (2009).

35. N.Y. Times Co. v. United States, 403 U.S. 713, 724 (1971) (Douglas, J., concurring) (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964)).

36. Lillian R. BeVier, *An Informed Public, an Informing Press: The Search for a Constitutional Principle*, 68 CALIF. L. REV. 482, 482 (1980).

Although these disclosures hypothetically notify terrorists of avenues of attack against America, they might also improve national security by giving notice to the government of any security vulnerabilities of which it is not aware so it can take steps to remedy those weaknesses. Additionally, even if the government is aware of the vulnerabilities, their exposure may instigate a public outcry, demanding that the weaknesses be corrected quickly—resulting in greater security, faster.³⁷

Even Gabriel Schoenfeld, who publicly advocated for the criminal prosecution of the *New York Times* for revealing the Bush administration's warrantless wiretapping program, admits there may be some national benefit to whistleblowers and the publication of leaks: "We all depend on newspapers and television for information about how we are being governed. Leaks are part of that daily flow, and we depend upon leaks. I as a citizen depend upon leaks."³⁸

On the other hand, there are people who argue that national security is a government interest of the highest magnitude and some level of secrecy is necessary. Thus, publishers should be banned from releasing all undisclosed government documents, even if the release of this information is unlikely to lead to certain, irreparable harm. For example, Judge Richard Posner counters:

Secrecy is essential. And it cannot be secured merely by having laws that forbid the disclosure of classified information. It is too easy for possessors of such information to leak it without running a significant risk of detection. To keep it secret the government must be able to punish the media when they knowingly publish it.³⁹

Following this logic, *Garcetti* alone does not adequately protect the government's secrets because it is often too difficult to establish a prima facie case against leakers. Rather, the government should have the option to criminally or civilly sanction the press for publishing information found in leaked, previously undisclosed documents.

Additionally, Judge Posner is deeply concerned about the overclassification of government information:

Government agencies frequently classify material not because it contains secrets that would endanger the nation if revealed to the public but because publication would embarrass the agency by revealing its mistakes or would provide helpful information to a rival agency. Overclassification creates a culture of secrecy that inhibits

37. Judson O. Littleton, Note, *Eliminating Public Disclosures of Government Information from the Reach of the Espionage Act*, 86 TEX. L. REV. 889, 910 (2008).

38. Bill Keller, *Secrecy in Shreds*, N.Y. TIMES, Apr. 3, 2011, at MM11 (internal quotation marks omitted).

39. RICHARD A. POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY 106 (2006).

the production and flow of information to which the public should be entitled.⁴⁰

Representative John Conyers agrees that overclassification is a problem:

[O]ur problem with our security system, and why Bradley Manning can get his hands on all these cables, is we got low fences around a vast prairie because the government classifies just about everything. What we really need are high fences around a small graveyard of what is really sensitive. Furthermore, we are too quick to accept government claims that risk the national security and far too quick to forget the enormous value of some national security leaks.⁴¹

Posner and Conyers, thus, seek a rule that punishes publishers; yet they concede that not all undisclosed government information poses the same national security risk. They believe that the goal of transparency is best reached through an improved classification system that shields the public only from information that is truly damaging. If such dangerous information is published, they believe the government should have recourse to punish the publisher. Nevertheless, as discussed below, the Court in *Bartnicki* rejected Posner's reasoning that it is acceptable to punish publishers in order to deter and detect leakers.⁴²

At its core, the policy debate about the classic tension between transparency and accountability versus safety and security has no clear answers. One thing is clear, the Framers of the Constitution and the Supreme Court as its ultimate arbiters would never allow national security concerns to categorically trump the freedom to publish: "History teaches us how easily the spectre of a threat to 'national security' may be used to justify a wide variety of repressive government actions."⁴³

II. Two Methods the Government Might Use to Stop WikiLeaks (and Other Media) from Publishing Its Secrets

The United States government has never prosecuted the press for disclosing government secrets in the nation's 236 year history. The only case similar to the WikiLeaks situation was forty-one years ago in

40. *Id.* at 107.

41. *Espionage Act and the Legal and Constitutional Issues Raised by WikiLeaks: Hearing Before the H. Comm. on the Judiciary*, 111th Cong. 2 (2010) [hereinafter *Espionage Act Hearing*] (opening statement of Rep. John Conyers, Jr., Chairman, H. Comm. on the Judiciary).

42. *Bartnicki v. Vopper*, 532 U.S. 514, 529–32 (2001).

43. *United States v. Soussoudis (In re Wash. Post Co.)*, 807 F.2d 383, 391 (4th Cir. 1986).

New York Times v. United States, the Pentagon Papers case, where the government tried to enjoin the *New York Times* and *Washington Post* from publishing a leaked, classified report. The case ultimately left unresolved the issue of whether the government may criminally or civilly punish the press for publishing classified or previously undisclosed information.⁴⁴ Despite this laissez-faire history, given the magnitude of previously undisclosed government information WikiLeaks released over the past two years, the government is currently exploring the possibility of making WikiLeaks the first publisher to be punished criminally, civilly, or both.⁴⁵

There are two primary legal means available to the DOJ to stop WikiLeaks from publishing previously undisclosed government information: (1) invoking a prior restraint to prevent future publications before they happen; and (2) utilizing the Espionage Act to criminally sanction the publication after the fact.

A. Prior Restraint

There is a heavy presumption under the First Amendment that prior restraints are unconstitutional.⁴⁶ Prior restraints, injunctions enjoining “harmful” speech, are “the most serious and the least tolerable infringement of First Amendment rights”⁴⁷ because they happen before both the speech and the harm occurs, never giving speakers the opportunity to express themselves. Moreover, prior restraints are offensive to personal autonomy, removing the speaker’s choice of whether or not to publish and deal with the consequences.⁴⁸

The government may overcome the burden against prior restraint only if the government’s interest is of the highest magnitude and the prior restraint is necessary because the harm is certain and irreparable, effective in preventing the harm, and alternatives to the prior restraint do not exist to protect the government’s interest.⁴⁹ For example, prior restraints may be issued against the press if they seek

44. See *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam) (affirming the lower court’s decision that the government failed to meet its heavy burden to get a prior restraint to prevent the *New York Times* and the *Washington Post* from further publishing the Pentagon Papers).

45. See Savage, *supra* note 9; Savage, *supra* note 10.

46. *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963) (“Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.”).

47. *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976).

48. See FARBER, *supra* note 19, at 45–48.

49. See *Neb. Press Ass’n*, 427 U.S. at 605, 609.

R

R

to publish the sailing date of troops,⁵⁰ hydrogen bomb blueprints,⁵¹ or trade secrets.⁵²

In *New York Times v. United States*, Justices Black, Douglas, White, Marshall, Brennan, and Stewart held in a per curiam opinion that the government could not enjoin the *New York Times* and the *Washington Post* from publishing the Pentagon Papers report, a classified historical study on Vietnam policy, leaked by RAND Corporation employee Daniel Ellsberg.⁵³ Justice Douglas thought that this report was improperly classified as top secret, pointing out that the “[t]he dominant purpose of the First Amendment was to prohibit the widespread practice of governmental suppression of embarrassing information.”⁵⁴ Justice Black also warned against allowing the government unchecked authority to determine what information is too dangerous to enter the marketplace of ideas: “The word ‘security’ is a broad, vague generality whose contours should not be invoked to abrogate the fundamental law embodied in the First Amendment.”⁵⁵

Despite this heavy government burden, in 2008 a district court judge issued a temporary restraining order that required Dynadot, an internet service provider, to stop hosting WikiLeaks.org and WikiLeaks to stop “publishing, disseminating, or hyperlinking to any document.”⁵⁶ Nonetheless, the requested preliminary injunction was denied after intervention by various pro-First Amendment amici.⁵⁷ One such group argued:

[T]he right to access the materials posted on the Wiki[L]eaks website is peculiarly deserving of protection under the First Amendment because the materials implicate issues of the utmost importance, such as international human rights, political corruption, and other governmental misconduct. As much or more than

50. *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931).

51. *United States v. Progressive, Inc.*, 467 F. Supp. 990, 996 (W.D. Wis. 1979).

52. *See Proctor & Gamble Co. v. Bankers Trust Co.*, 78 F.3d 219, 226–27 (6th Cir. 1996) (stating in dicta that the court would allow a temporary restraining order (“TRO”), a specific type of prior restraint, on releasing trade secrets if the elements of Rule 65 of the Federal Rules of Civil Procedure were met).

53. *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam); Noam Cohen, *What Would Daniel Ellsberg Do with the Pentagon Papers Today?*, N.Y. TIMES, Apr. 19, 2010, at B3.

54. *N.Y. Times Co.*, 403 U.S. at 723–24 (Douglas, J., concurring).

55. *Id.* at 719 (Black, J., concurring).

56. *Bank Julius Baer & Co. v. WikiLeaks*, No. CV08-0824 JSW, 2008 WL 612072 (N.D. Cal. Feb. 18, 2008); *Bank Julius Baer & Co. v. WikiLeaks*, 535 F. Supp. 2d 980, 983 (N.D. Cal. 2008).

57. *Bank Julius Baer & Co.*, 535 F. Supp. 2d at 984–85 (“[I]t is clear that in all but the most exceptional circumstances, an injunction restricting speech pending final resolution of the constitutional concerns is impermissible.”).

any other value, the First Amendment serves the people's interest in self-government.⁵⁸

While TROs are inherently prone to error as they must be decided on before a judge is fully briefed on the issue, this judge's initial granting suggests that there may be some willingness to allow a prior restraint against WikiLeaks.

Given the *New York Times v. United States* precedent, a prior restraint on WikiLeaks seems unlikely unless they publish something as egregious as the sailing date of troops.⁵⁹ Moreover, such an order may not be feasible to enforce anyway given the construction of the Internet and WikiLeaks' global scale. According to Julian Assange:

The [United States] does not have the technology to take the site down. . . . Just the way our technology is constructed, the way the Internet is constructed. It's quite hard to stop things from reappearing. . . . [W]e now have some 2,000 fully independent in every way Web sites, where we're publishing around the world.⁶⁰

Since one requirement of a prior restraint is that it would be "effective" in curing the harm proposed, it is extremely unlikely that a prior restraint issued against WikiLeaks would be upheld.

B. Espionage Act

As an alternative, the government would likely attempt to use sections 793 and 798(a) of the Espionage Act to prosecute those who do not occupy a position of trust with the government, namely the media.⁶¹ Originally passed in 1917 and amended most recently in 1950, "the Espionage Act is one of the most confusing and ambiguous federal criminal statutes."⁶²

Section 793(c) punishes the receipt of documents with knowledge that they have been obtained in violation of other espionage pro-

58. Motion of Public Citizen and California First Amendment Coalition to Intervene as Defendants or, in the Alternative, to Appear as Amici Curiae at 10, *Bank Julius Baer & Co. v. WikiLeaks*, 535 F. Supp. 2d 980 (N.D. Cal. 2008) (No. CV08-0824 JSW), 2008 WL 538832.

59. See *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 716 (1931) (offering the disclosure of the sailing date of troops as a narrow exception to the general rule against prior restraints). It is interesting to consider if this exception still holds given developments in the speed of communications and transportation since 1931, allowing military generals to make quick tactical changes if this sensitive information were to be disclosed to the public.

60. *60 Minutes: WikiLeaks' Julian Assange* (CBS television broadcast Jan. 30, 2011), available at <http://www.cbsnews.com/video/watch/?id=7300034n>; *Julian Assange, The Man Behind WikiLeaks*, CBSNews (Jan. 31, 2011), http://www.cbsnews.com/2102-18560_162-7286686.html?tag=contentMain;contentBody.

61. 18 U.S.C. §§ 793, 798 (2006).

62. Mary-Rose Papandrea, *Lapdogs, Watchdogs, and Scapegoats: The Press and National Security Information*, 83 IND. L.J. 233, 263 (2008).

visions.⁶³ Section 793(d) punishes the communication to unauthorized individuals of information related to national defense by individuals who are authorized to have the information.⁶⁴ This section targets government employees turned whistleblowers. On the other hand, section 793(e) punishes the communication, dissemination, or retention of such information by an individual not authorized to have it.⁶⁵ This section does not explicitly prohibit publishing; however, it is this sub-section of 793 that is most likely to affect third party publishers. Moreover, section 798 punishes the knowing and willful disclosure of classified “communication intelligence” that is prejudicial to the safety or interests of the United States or for the benefit of any foreign government.⁶⁶

Scholars generally agree that facially, sections 793(e) and 798(a) have the *potential* to apply to media outlets that obtain, retain, or publish national defense information.⁶⁷ However, Harold Edgar and Benno Schmidt assert that “the legislative record is reasonably clear that a broad literal reading was not intended” given Congress’ decision to not include a proposed provision that would have given the Executive the power to censor the press.⁶⁸ Similarly, Benjamin S. Duval concluded that the “Espionage Act is of uncertain applicability against disclosures made for the purpose of public debate.”⁶⁹ Additionally, Judge Ellis in *Rosen* held that the Espionage Act includes a scienter requirement that would be difficult to prove against people who disseminate information.⁷⁰ Under this scienter requirement, the government must show that defendants willfully communicated the information and had a “bad faith purpose to either harm the United States or to aid a foreign government.”⁷¹ Since a key function of the press is to disseminate information to the public in good faith, it

63. § 793(c).

64. § 793(d); see *United States v. Morison*, 844 F.2d 1057, 1070 (4th Cir. 1988) (holding a government employee, who also happened to work for the press, liable under § 793(d) for transmitting confidential government information to a newspaper).

65. § 793(e).

66. § 798.

67. See generally *Espionage Act Hearing*, *supra* note 41 (advising Congress on the affects of the SHIELD Act, S. 4004, 111th Cong. (2010) and the constitutional and political programs associated with applying the Espionage Act, in either current or amended form, to the news media).

68. Harold Edgar & Benno C. Schmidt, Jr., *The Espionage Statutes and Publication of Defense Information*, 73 COLUM. L. REV. 929, 1000 (1973).

69. Benjamin S. DuVal, Jr., *The Occasions of Secrecy*, 47 U. PITT. L. REV. 579, 673 (1986).

70. See *United States v. Rosen*, 445 F. Supp. 2d 602, 625–26 (E.D. Va. 2006).

71. *Id.*

would be difficult for the government to effectively use the Espionage Act against the press.

In one of the few cases on point, *New York Times v. United States*, three Supreme Court justices in the majority—Justices White, Stewart, and Marshall—each suggested in concurring opinions that the Espionage Act could be used to criminally prosecute publishers.⁷² Before discussing the various provisions of the Espionage Act, Justice White pointed out: “[F]ailure by the Government to justify prior restraints does not measure its constitutional entitlement to a conviction for criminal publication. . . . The Criminal Code contains numerous provisions potentially relevant to these cases.”⁷³ While the Court left the door open for the government to prosecute the press for disseminating government secrets under the Espionage Act, it has not yet been employed for this purpose. Nonetheless, if the government chooses to pursue legal action against WikiLeaks, it will likely rely on the above-mentioned sections of the Espionage Act.

In an effort to amend the law to expressly enable the government to prosecute WikiLeaks for future publications of previously undisclosed government information, Senators John Ensign, Joseph Lieberman, and Scott Brown introduced the SHIELD Act (Securing Human Intelligence and Enforcing Lawful Dissemination) in February 2011.⁷⁴ The SHIELD Act would amend § 798 of the Espionage Act to also make it illegal to publish information “concerning the human intelligence activities of the United States or any foreign government” and “concerning the identity of a classified source or informant of an element of the intelligence community of the United States.”⁷⁵ Such an

72. See *N.Y. Times Co. v. United States*, 403 U.S. 713, 734 (1971) (White & Stewart, JJ., concurring) (“Congress appeared to have little doubt that newspapers would be subject to criminal prosecution if they insisted on publishing information of the type Congress had itself determined should not be revealed.”); *id.* at 743 (Marshall, J., concurring) (Congress enacted the Espionage Act to protect national security and make it a “crime to receive, disclose, communicate, withhold, and publish certain documents, photographs, instruments, appliances, and information.”).

73. *Id.* at 733–35 (White & Stewart, JJ., concurring).

74. SHIELD Act, S. 315, 112th Cong. (2011). S. 315 has been read twice and referred to the Senate Judiciary Committee. See *Bill Summary & Status—112th Congress (2011–2012)—S. 315*, THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:s.00315>: (last visited Jan. 18, 2012). The House version of the SHIELD Act, H.R. 703, 112th Cong. (2011), was referred to the Subcommittee on Crime, Terrorism, and Homeland Security and has ten co-sponsors. *Bill Summary & Status—112th Congress (2011–2012)—H.R. 703*, THOMAS, <http://thomas.loc.gov/cgi-bin/bdquery/z?d112:HR00703>: (last visited Jan. 18, 2012). A previous version of the SHIELD Act was introduced in December 2010. S. 4004, 111th Cong. (2010); H.R. 6506, 111th Cong. (2010).

75. S. 315, § 2(a).

amendment would broaden the scope of the ninety-five year old Espionage Act to directly and explicitly target publishers and journalists. It will be interesting to see if this bill survives committee.

III. Does the *Daily Mail* Principle Protect WikiLeaks from Liability when it Knowingly Receives and Publishes Illegally-Obtained Information About a Matter of Public Concern?

The *Daily Mail* principle—the idea that publishers who knowingly receive and publish information on a matter of public concern that was illegally obtained by a third party is protected under the First Amendment—developed over a series of cases, starting with *Landmark Communications, Inc. v. Virginia*⁷⁶ and was most recently refined in *Bartnicki v. Vopper*.⁷⁷

The First Amendment is a patchwork of two primary modes of analysis, the (1) balancing approach and (2) the categorical approach:

Generally, balancing approaches set the individual's interest in asserting a right against the government's interest in regulating it, attach whatever weights are appropriate for the context, and determine which is weightier. In contrast, categoricalism prohibits this kind of weighing of interests in the individual case and asks only whether the case falls inside certain predetermined, outcome-determinative lines.⁷⁸

The categorical approach allows for both categorical inclusion and categorical exclusion. For example, child pornography is categorically excluded from First Amendment protection;⁷⁹ whereas, this Comment argues that publication on matters of public concern should be categorically protected.

Whether the *Daily Mail* principle protects WikiLeaks against liability depends on if: (1) the information published by WikiLeaks is regarding a matter of public concern; (2) WikiLeaks did not actively participate in unlawful conduct other than the information's ultimate publication; and (3) *Bartnicki* applies to the government's right to keep all undisclosed information secret, instead of just the right to individual privacy.

76. *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829 (1978).

77. *Bartnicki v. Vopper*, 532 U.S. 514 (2001).

78. Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 381–98 (2009).

79. *New York v. Ferber*, 458 U.S. 747, 763–74 (holding child pornography a category of material outside the protection of the First Amendment).

Courts recognize that “speech on ‘matters of public concern’ . . . is ‘at the heart of the First Amendment’s protection.’”⁸⁰ The *Daily Mail* principle shields the media from liability for knowingly publishing truthful information that was illegally obtained by a third party when that information is about a matter of public concern.⁸¹ Nevertheless, scholars disagree about the meaning and scope of the principle since the *Bartnicki* is a plurality opinion, with Justices Breyer and O’Connor writing a separate concurrence using different reasoning to reach the same outcome. Richard D. Shoop fears that “*Bartnicki*’s ultimate usefulness is limited because the vagueness of the holding invites future challenges likely to result in an even more restricted holding.”⁸² However, others recognize that *Bartnicki* is clear that “when the press induces sources to disclose what they know about newsworthy matters, it is protected by the First Amendment when it proceeds to publish such information, regardless of the legality of its source’s actions.”⁸³

Nonetheless, the *Daily Mail* line of cases largely involves privacy interests. The law is unclear whether a robust constitutional protection for speech about public issues would extend to speech about previously undisclosed government information that touches on national security, a government interest of the highest order. This ambiguity in the law arguably gives the press greater latitude to report on important national security stories such as the Bush administration’s warrantless wiretapping and extraordinary rendition programs.⁸⁴ William H. Freivogel warns that media lawyers should be cautious in this uncertain area of First Amendment law or risk the courts adopting clear rules that are hostile to the press:

[T]he press—and by extension the public—is better served by a continuation of the state of uncertainty than by bright-line rules. Recent attempts by the press to argue in favor of an extravagant reporter’s privilege have backfired, partly because of unfavorable facts and partly because media lawyers have overstated the law.⁸⁵

80. *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758–59 (1985) (quoting *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 776 (1978)).

81. See *infra* Part III.A.

82. Richard D. Shoop, Recent Case, *Bartnicki v. Vopper*, 532 U.S. 514 (2001), 17 BERKELEY TECH. L.J. 449, 465 (2002).

83. Lee Levine et al., *Handcuffing the Press: First Amendment Limitations on the Reach of Criminal Statutes as Applied to the Media*, 55 N.Y.L. SCH. L. REV. 1015, 1026 (2010–2011).

84. See, e.g., Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations: ‘Stress and Duress’ Tactics Used on Terrorism Suspects Held in Secret Overseas Facilities*, WASH. POST, Dec. 26, 2002, at A01; James Risen & Eric Lichtblau, *Bush Lets U.S. Spy on Callers Without Courts*, N.Y. TIMES, Dec. 16, 2005, at A1.

85. Freivogel, *supra* note 34, at 97.

Alternatively, the government may decide not to prosecute publishers out of fear that such a case may present the opportunity for the Court to utilize the *Daily Mail* principle to explicitly provide the press with the heightened First Amendment protection that this Comment argues may exist, emboldening reporters to publish stories vital to our democracy without fear of prosecution. It remains to be seen if WikiLeaks will be the test case to break this stalemate.

A. The Creation of the *Daily Mail* Principle

Historically, in order to determine if the speech was constitutionally protected, courts used a balancing test, weighing the First Amendment interests against the plaintiff's personal privacy interest. In *Bartnicki* and the *Daily Mail* line of cases, a majority of the Justices moved closer to embracing categorical protection for truthful publication on matters of a public concern. The following section explains this development.

1. *Landmark Communications, Inc. v. Virginia*

In *Landmark Communications, Inc. v. Virginia*, a local newspaper published a story accurately revealing that the Virginia Judicial Inquiry and Review Commission was investigating a particular judge for possible ethics violations.⁸⁶ The newspaper was prosecuted under a Virginia statute that made disclosure of such confidential investigations a misdemeanor.⁸⁷ The Supreme Court refused to adopt an absolute categorical protection from liability for all truthful information of public concern, but instead held that the "government may not prohibit or punish the publication of that information once it falls into the hands of the press, unless the need for secrecy is manifestly overwhelming."⁸⁸ Thus, in *Landmark* the Court made clear the presumption that the press should not be prosecuted for publishing accurate information it receives, allowing the government to rebut in cases where the need for secrecy is overwhelming.

2. *Smith v. Daily Mail Publishing Co.*

In *Smith v. Daily Mail Publishing Co.*, when a fifteen-year old student was shot and killed at the local junior high school, reporters went to the scene after hearing reports of the crime on police scanners.⁸⁹

86. *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 831–32 (1978).

87. *Id.*

88. *Id.* at 849 (Stewart, J., concurring).

89. *Smith v. Daily Mail Publ'g Co.*, 443 U.S. 97, 99 (1979).

They learned the suspect's name through traditional newsgathering techniques (i.e., not directly from the government) by interviewing the witnesses, the police, and the assistant prosecuting attorney at the scene.⁹⁰ A West Virginia statute punished publication of juveniles' names without court permission as a misdemeanor.⁹¹ The *Daily Mail* newspaper published an initial story about the events, but knowing that such publication would be illegal decided to omit the minor's name; however, a competing paper published the minor's name, as did local radio stations.⁹² Subsequently, the *Daily Mail* decided to publish another story, this time including the minor's name.⁹³ The *Daily Mail* was soon after indicted under the statute.⁹⁴

The Supreme Court articulated the following basic rule: "[I]f a newspaper lawfully obtains truthful information about a matter of public significance then state officials may not constitutionally punish publication of the information, absent a need to further a state interest of the highest order."⁹⁵ In analyzing the case, the Court did not specify what level of scrutiny it was applying; however, the opinion uses the language of heightened scrutiny, either intermediate or strict. For example, the Court found that punishing publishers was not "necessary" to achieve the government's interest in keeping the name of juveniles accused of a crime confidential in order to further their rehabilitation.⁹⁶ Moreover, the means of accomplishing this goal was underinclusive: "The statute does not restrict the electronic media or any form of publication, except 'newspapers,' from printing the names of youths charged in a juvenile proceeding."⁹⁷ Therefore, the statute banning publication of such names was unconstitutional.⁹⁸ The Court described this holding as "narrow" and noted that the issue is "simply the power of a state to punish the truthful publication of an alleged juvenile delinquent's name lawfully obtained by a newspaper."⁹⁹

Adding to the presumption established in *Landmark*, the Supreme Court's balancing/tiers of scrutiny approach in *Daily Mail* ap-

90. *Id.*

91. *Id.* at 98–99.

92. *Id.* at 99.

93. *Id.* at 100.

94. *Id.*

95. *Id.* at 103.

96. *Id.* at 104–05.

97. *Id.*

98. *Id.* at 106.

99. *Id.* at 105–06.

plied heightened scrutiny when the government sought to prosecute the press for publishing accurate information. The case also clarified that the government interest in protecting the anonymity of juvenile offenders did not outweigh the freedom of the press.

3. *Florida Star v. B.J.F.*

In *Florida Star v. B.J.F.*, a Florida statute punished the publication of rape victims' names.¹⁰⁰ A *Florida Star* newspaper reporter-trainee obtained a rape victim's name from a publicly available police report, and the newspaper published a story about the incident including B.J.F.'s full name.¹⁰¹ Whereas in *Daily Mail* it was unclear if the Court was applying intermediate or strict scrutiny, the Court in *Florida Star* more clearly applied strict scrutiny, noting that keeping rape victims' names out of the press "further[s] a state interest of the highest order" but finding problems with the means employed for not being sufficiently narrowly tailored.¹⁰² The Supreme Court held, "[w]here a newspaper publishes truthful information, which it has lawfully obtained, punishment may lawfully be imposed, if at all, only when narrowly tailored to a state interest of the highest order."¹⁰³

Key for the Court was "B.J.F.'s identity would never have come to light were it not for the erroneous, if inadvertent, inclusion by the Department of her full name in an incident report made available in a pressroom open to the public."¹⁰⁴ It seemed unfair to punish the media for the government's oversight.¹⁰⁵ Instead of prosecuting the media for publication, the Court noted that the government is better suited to bear the burden of better protecting its sensitive information from being made public in the first instance.¹⁰⁶

The statute at issue in the case was especially troubling and, ultimately underinclusive, because it only applied to an "instrument of mass communication."¹⁰⁷ Local town gossip, which could be equally damaging to juvenile offenders, was not covered by the statute.¹⁰⁸ Moreover, the Court wanted to avoid any chilling effect caused by

100. Fla. Star v. B.J.F., 491 U.S. 524, 526 (1989).

101. *Id.* at 527.

102. *Id.* at 537–38.

103. *Id.* at 541.

104. *Id.* at 538.

105. *See id.* at 525.

106. *See id.* at 534 (describing how the government has ample means to safeguard sensitive information that are less drastic than punishing truthful publication).

107. *Id.* at 540.

108. *Id.*

punishing the press for publishing information found in an official news release.¹⁰⁹ Nonetheless, while adding the requirement of narrow tailoring in order to provide added protections for publishers, the Court did not reach the issue whether “truthful publication may never be punished consistent with the First Amendment.”¹¹⁰ In developing the *Daily Mail* principle, *Florida Star* is most important as signaling that the principle was not anomalous and could be extended beyond the facts of the *Daily Mail* case.

4. *Bartnicki v. Vopper*

The most recent decision clarifying and expanding the *Daily Mail* principle is *Bartnicki v. Vopper*.¹¹¹ *Bartnicki* expanded the *Daily Mail* principle by applying its protection of publishers to cases where the information at issue was obtained by the publisher’s source illegally. In *Bartnicki*, an unknown person illegally intercepted a cellular phone conversation between Bartnicki, a teacher’s union negotiator, and Kane, the union’s president about a heated collective bargaining negotiation.¹¹² At one point during the conversation, Kane said: “If they’re not gonna move for three percent, we’re gonna have to go to their, their homes To blow off their front porches, we’ll have to do some work on some of those guys.”¹¹³ The interceptor anonymously left a tape of the conversation in the mailbox of Yocum, the head of the local taxpayers’ organization who had opposed the union’s demands throughout the negotiations.¹¹⁴ Yocum then sent the tape to Vopper, a radio commentator critical of the teachers’ union, and Vopper played the private conversation on the radio.¹¹⁵

The plurality in *Bartnicki* explicitly rejected categorically protecting all truthful speech on matters of public concern: “Our refusal to construe the issue presented more broadly is consistent with this Court’s repeated refusal to answer categorically whether truthful publication may ever be punished consistent with the First Amendment.”¹¹⁶ Nevertheless, in practice, this is precisely what the Court in *Bartnicki* actually does. *Bartnicki* is distinguishable from the previous

109. See *id.* at 535–36 (discussing the “timidity and self-censorship” which may result from allowing media to be punished for publishing certain truthful information).

110. *Id.* at 532.

111. *Bartnicki v. Vopper*, 532 U.S. 514 (2001).

112. *Id.* at 517–18.

113. *Id.* at 518–19 (alteration in original).

114. *Id.*

115. *Id.*

116. *Id.* at 529.

Daily Mail line of cases in that (1) the Court does not utilize the language that animates the traditional tiers of scrutiny analysis; and (2) puts a thumb on the scale in favor of speech about a matter of public concern¹¹⁷—both of which move the court closer to the categorical approach.

Ultimately, *Bartnicki* holds that the media should be *constitutionally* protected for publishing truthful information about a matter of public concern if the media did not participate in unlawfully acquiring the information, even if they knew it was illegally obtained.¹¹⁸ Essentially, “a stranger’s illegal conduct does not suffice to remove the First Amendment shield from speech about a matter of public concern.”¹¹⁹ The plurality recognized that “there are important interests to be considered on *both* sides of the constitutional calculus.”¹²⁰ While the plurality states that “privacy concerns give way when balanced against the interest in publishing matters of public importance,”¹²¹ the opinion may be read as not using the balancing approach at all, but rather a categorical approach.

In arriving at its holding, the Court never actually balanced anything since it easily rejected both of the government’s proposed compelling interests in punishing publishers. The first government interest was removing the incentive to tap.¹²² The Court quickly rejected this argument, noting, “it would be quite remarkable to hold that speech by a law-abiding possessor of information can be suppressed in order to deter conduct by a non-law-abiding third party.”¹²³ Further, the Court suggested that the government must offer empirical evidence and not mere speculation that punishing publishers has any deterrent effect on actual interceptors.¹²⁴

Second, the government argued that it was necessary to punish publishers in order to reduce harm to private speakers.¹²⁵ Justice Rehnquist and the dissenters found this argument compelling, arguing that the plurality’s decision “diminishes, rather than enhances, the purposes of the First Amendment, thereby chilling the speech of the millions of Americans who rely upon electronic technology to com-

117. *See id.* at 534.

118. *Id.* at 528, 534–35.

119. *Id.* at 535.

120. *Id.* at 533.

121. *Id.* at 534.

122. *Id.* at 529.

123. *Id.* at 529–30.

124. *Id.* at 530–31.

125. *See id.* at 532–33.

municate each day.”¹²⁶ The plurality, however, rejects this argument without substantive discussion.¹²⁷ Justices Breyer, in his concurrence with whom Justice O’Connor joins, gives more weight to the importance of protecting people’s privacy but nevertheless concludes that the statutes here are overbroad.¹²⁸

The plurality opinion also points to the precedent like *New York Times v. Sullivan* and many others that “relied on our ‘profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.’”¹²⁹ Furthermore, the Court recognized the possibility of a chilling effect if the law allowed punishment for publication of truthful information.¹³⁰

Importantly, the Court also states, “we draw no distinction between the media respondents and Yocum.”¹³¹ Thus, *Bartnicki* applies beyond the press to all who innocently receive illegally obtained information and share it with others. As a result, this protection would apply to WikiLeaks even if the government can somehow distinguish it from traditional media.

Justices Breyer and O’Connor’s concurrence appears to narrow the holding of *Bartnicki*. Breyer and O’Connor signed onto the opinion since Vopper “acted lawfully (up to the time of final public disclosure)” and the conversation contained “a threat of potential physical harm to others.”¹³² The concurrence also points out that *Bartnicki*

126. *Id.* at 542 (Rehnquist, J. dissenting).

127. *See id.* at 529 (plurality opinion) (“The Government identifies . . . the interest minimizing the harm to persons whose conversations have been illegally intercepted. We assume that . . . interest[] adequately justif[ies] the prohibition . . . against the interceptor’s own use[.] . . . but it by no means follows that punishing disclosures of lawfully obtained information of public interest by one not involved in the initial illegality is an acceptable means of serving those ends.”).

128. *See id.* at 538 (Breyer & O’Connor, JJ., concurring) (“[T]he statutes, as applied in these circumstances, do not reasonably reconcile the competing constitutional objectives. Rather, they disproportionately interfere with media freedom.”).

129. *Id.* at 534 (plurality opinion) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)); The Court in *New York Times Co. v. Sullivan*, an unsuccessful defamation case brought by a public figure against the *New York Times* for an editorial advertisement that suggested the plaintiff’s police force engaged in racially-motivated arrests and suppression of student groups during the Civil Rights Movement, noted that “we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.” *N.Y. Times Co.*, 375 U.S. at 256–61, 270.

130. *See Bartnicki*, 532 U.S. at 535 n.22 (citing *Fla. Star v. B.J.F.*, 491 U.S. 524, 535 (1989)).

131. *Id.* at 525 n.8.

132. *Id.* at 535–36 (Breyer & O’Connor, JJ., concurring).

and Kane had a low interest in privacy since they were limited purpose public figures on the topic of the negotiations.¹³³ The concurrence would appear to allow statutes restricting media freedom, providing the laws are narrowly tailored “in order [to] reasonably . . . reconcile media freedom with personal, speech-related privacy.”¹³⁴ Nonetheless, the Justices find that the balance struck in this particular statute “disproportionately interfere[s] with media freedom” because it punishes publishers who “engaged in no unlawful activity other than the ultimate publication of the information another had previously obtained.”¹³⁵ Justices Breyer and O’Connor’s stated goal was to keep the constitutional holding narrow to allow legislatures flexibility in the future.¹³⁶

While Breyer and O’Connor revert to the more traditional balancing approach, their ultimate conclusion—that publishers should be protected by the First Amendment if they engage in completely lawful conduct other than the ultimate publication of sensitive material¹³⁷—is not that different from the plurality opinion. Under both approaches, any attempt by the government to prosecute WikiLeaks under the Espionage Act for releasing material that solely implicated issues of personal privacy would be unlawful. It is less clear that this rule may be stretched to also encompass publication of previously undisclosed government information that may involve issues of national security.

On the other hand, Daniel P. Paradis argues the concurrence advocates a totality of the circumstances test, which may provide even broader protection for publishers who obtained the information *illegally*:

Under Justice Breyer’s approach, it seems that the media’s involvement, or lack thereof, in the illegal interception might not be dispositive in defeating a First Amendment defense, as it is in Justice Steven’s framework. For example, direct illegal interception by the media could perhaps be outweighed by the fact that the contents

133. *Id.* at 539–40 (“[T]he speakers themselves, the president of a teacher’s union and the union’s chief negotiator, were ‘limited public figures,’ for they voluntarily engaged in a public controversy. They thereby subjected themselves to somewhat greater public scrutiny and had a lesser interest in privacy than an individual engaged in purely private affairs.”).

134. *Id.* at 538.

135. *Id.*

136. *See id.* at 541 (“[W]e should avoid adopting overly broad or rigid constitutional rules, which would unnecessarily restrict legislative flexibility.”).

137. *Id.* at 536–38.

of the communication reveal egregious acts or plots by “all-purpose” public figures (e.g., congressmen).¹³⁸

Paradis’ analysis seems to be stretching the text. Further, this analysis is not necessary in order to protect WikiLeaks because the organization did nothing illegal short of publication—it is no different than Vopper in *Bartnicki*, a passive recipient of information. Nevertheless, even if Paradis’ analysis is correct, the approach suggested by the plurality opinion would provide superior protection to publishers, providing they have clean hands regarding the process of obtaining the information. The plurality opinion provides heightened First Amendment protection for publication of speech that is a matter of public concern when the publisher acted lawfully, except for the ultimate publication.

WikiLeaks thus should receive maximum First Amendment protection allowed under *Bartnicki* for publishing the Iraq War Logs, Afghan War Diaries, and Guantanamo Bay prisoner dossiers (providing WikiLeaks or Assange did not actively participate in seeking out this information, for example, by hacking into secure government websites). Even though this information arguably hindered diplomatic relations between the United States and its allies,¹³⁹ it has been vital to the global press as source material, as a check on military mistakes, providing the world with a more accurate death toll, and overall informing American citizens as they decide on the future of the United States’ involvement in the War on Terror.

The cables also show that the U.S. government tends to over-classify information (including cables that are merely embarrassing or summarize press reports)¹⁴⁰—another topic that is a subject of legitimate news interest. Representative William Delahunt stated that too much secrecy and overclassification within the executive branch “puts American democracy at risk.”¹⁴¹ Further, with each release, WikiLeaks and its media partners are taking additional precautionary steps to comb through the information and remove anything that may pose

138. Daniel P. Paradis, Comment, *Bartnicki v. Vopper: Cell Phones and Throwing Stones*, 37 NEW ENG. L. REV. 1117, 1141–43 (2003).

139. Daniel Markey et al., *Will WikiLeaks Hobble U.S. Diplomacy?*, COUNCIL ON FOREIGN REL. (Dec. 1, 2010), <http://www.cfr.org/diplomacy/wikileaks-hobble-us-diplomacy/p23526>.

140. See, e.g., *U.S., Canada Are Close Allies, That’s Classified?*, BOS. HERALD (Dec. 9, 2010), http://www.bostonherald.com/news/us_politics/view.bg?articleid=1301960&format=&page=2&listingType=politics.

141. *Espionage Act Hearing*, *supra* note 41, at 4 (statement of Rep. William Delahunt).

serious and irreparable harm, like names of informants, before publishing.¹⁴²

The Guantanamo Bay release consisted of intelligence summaries of approximately 765 prisoners written between 2002 and 2008.¹⁴³ These assessments also included the identities and photographs of the majority of the 172 prisoners still being held at the prison and the 201 prisoners released between 2002 and 2004.¹⁴⁴ Overall, knowing who is being detained and the reasons for their detention is of great political and social value as the American public begins to weigh in on issues, such as the United States holding detainees outside the jurisdiction of Article III courts, how it has been handling prisoner interrogations, and its use of indefinite detention.

B. Challenges to the *Daily Mail* Principle's Protection of Publishers

In the past ten years, two lower court cases have exhibited some pushback on the *Daily Mail* principle. In *Peavy v. WFAA-TV*, the Fifth Circuit refused to apply the *Daily Mail* principle because the defendant journalist assisted a source in illegally intercepting phone conversations.¹⁴⁵ Since his involvement was greater than being a passive recipient, his actions were outside the scope of heightened First Amendment protection.¹⁴⁶ In *United States v. Rosen*, the Eastern District of Virginia did not use the *Daily Mail* principle as a defense to Espionage Act liability for lobbyists who knowingly received classified information from a government employee.¹⁴⁷ This pushback suggests that if a categorical approach is to be embraced, it will necessarily be narrow in scope. Of the two cases, the court's logic in *Rosen* is more problematic for WikiLeaks because the case covered the same conduct as the *Daily Mail* line of cases (passive receipt of undisclosed information) but with two differences: (1) the content involved sensitive and

142. See Charlie Savage, *For Attorney General, New Congress Means New Headaches*, N.Y. TIMES, Dec. 31, 2010, at A12 ("While WikiLeaks was criticized for publishing a cache of Afghanistan war documents without redacting some details about informers, it has since been more cautious. Of a cache of more than 250,000 State Department cables, it has so far published fewer than 2,000, many of which were selected and redacted by a consortium of newspapers, including *The [New York] Times*.").

143. *Guantanamo Files*, *supra* note 4.

144. *Id.*

145. *Peavy v. WFAA-TV, Inc.*, 221 F.3d 158, 188–90 (5th Cir. 2000) ("[N]one of the considerations underlying the Court's application of the *Daily Mail* principle in *Florida Star* are present here.").

146. *Id.*

147. *United States v. Rosen*, 445 F. Supp. 2d 602, 607–09 (E.D. Va. 2006).

undisclosed government information instead of private, civilian conversations; and (2) the case involves lobbyists instead of journalists. However, at the end of the day, *Rosen* is not controlling precedent for WikiLeaks.

1. *Peavy v. WFAA-TV, Inc.*

In *Peavy v. WFAA-TV*, the Harmans listened to and recorded their neighbor's cordless telephone conversations, believing the conversations included threats to their safety and evidence of corruption.¹⁴⁸ Carver Dan Peavy, the Harmans' neighbor, was a trustee of the Dallas Independent School District who "controlled purchases of insurance for [the school district's] employees."¹⁴⁹ The Harmans contacted news station WFAA-TV about their recordings and was put into contact with Robert Riggs, a WFAA investigative journalist.¹⁵⁰ Riggs then proceeded to teach the Harmans how to make additional recordings.¹⁵¹ The station's outside legal counsel informed WFAA that recording the Peavy's conversations was illegal.¹⁵² Nonetheless, while Riggs did not play these recordings during his news broadcast, he disclosed information gained from them in his report.¹⁵³

The Fifth Circuit applied intermediate scrutiny after distinguishing the case from the *Daily Mail* line of cases based on the journalist's participation in the interception and the statute's content-neutral ban on all illegally intercepted communications.¹⁵⁴ The court applied intermediate scrutiny because the statutes did not "burden substantially more speech than is necessary to further governmental interests in protecting the privacy of communications."¹⁵⁵ Also, the court found that the wiretapping statute had merely an incidental effect on speech.¹⁵⁶

The Supreme Court did not grant certiorari to clarify the level of scrutiny that should be applied in such a case. Thus, *Peavy* suggests that a publisher's participation in illegally acquiring the information

148. *Peavy*, 221 F.3d at 164.

149. *Id.* at 163–64.

150. *Id.* at 164.

151. *Id.*

152. *Id.* at 166.

153. *Id.*

154. *Id.* at 181, 190–91 ("[I]t being undisputed that defendants . . . did participate to some extent concerning the interceptions, . . . it is quite questionable . . . that defendants 'lawfully received' the intercepted contents.").

155. *Id.* at 192.

156. *Id.* at 191.

may be fatal for categorical inclusion for all speech on a “matter of public concern.”¹⁵⁷ Rather, assuming intermediate scrutiny applies, the law is significantly less speech-protective. Yet, this case is distinguishable from the WikiLeaks situation because WikiLeaks is not advising its sources on how to obtain the information that is ultimately uploaded to the WikiLeaks website. As argued in *infra* Part III.C, WikiLeaks is a more passive recipient much like Vopper in *Bartnicki*.

2. *United States v. Rosen*

In *United States v. Rosen*, two American Israel Public Affairs Committee lobbyists, Rosen and Weissman, were accused of violating the Espionage Act by receiving information from Department of Defense employee Lawrence Franklin, who held top-secret security clearance and was passing classified information to Israel and various journalists.¹⁵⁸ Eventually, the Federal Bureau of Investigation realized Franklin was illegally sharing national defense information.¹⁵⁹ To mitigate his sentence, Franklin agreed to cooperate in the investigation of Rosen and Weissman.¹⁶⁰

In the ensuing criminal prosecution under the Espionage Act, Rosen and Weissman defended by challenging the Espionage Act’s constitutionality. Rosen and Weissman argued the phrases “information relating to the national defense” and “individuals ‘not entitled to receive’ the information” are unconstitutionally vague.¹⁶¹ The court held that “information related to the national defense” is not vague because it requires two elements: (1) the information must be a closely guarded government secret; and (2) is the type of information that, if disclosed, must have the potential to threaten U.S. national security.¹⁶² Likewise, the court held that the phrase “individuals ‘not entitled to receive’ that information” is also not vague.¹⁶³ Moreover, although Rosen and Weissman were not government employees and thus unaware of the classification definitions, the Espionage Act is

157. The *Peavy* court does not reach the issue of whether the information was a matter of public concern. Instead, the court focused on how the *Daily Mail* principle does not apply when the person claiming its protections participated in the illegal act. *Id.* at 190. Prior to this case, this rule only appeared in dicta of *Bartnicki*. See *Bartnicki v. Vopper*, 200 F.3d 109, 117 (3d Cir. 1999).

158. *United States v. Rosen*, 445 F. Supp. 2d 602, 607–09 (E.D. Va. 2006).

159. *Id.* at 609–10.

160. *Id.*

161. *Id.* at 617.

162. *Id.* at 617, 622 (“[B]oth phrases pass Fifth Amendment muster; they are not unconstitutionally vague as applied to these defendants.”).

163. *Id.* at 627.

saved by two scienter requirements that judges have read into the statute.¹⁶⁴ The government must first prove that the defendant willfully committed the prohibited conduct (i.e., had a bad intent) and, second, that the defendant had a reason to believe that disclosing the national defense information would harm the United States or aid a foreign government.¹⁶⁵ Thus, if people are truly ignorant, they cannot be prosecuted under the Espionage Act. This holding suggests that section 793 the Espionage Act would likely withstand a vagueness challenge if brought by WikiLeaks, despite the Act's sweeping language.

Rosen and Weissman also argued that the Espionage Act violates the First Amendment. The government argued that the Espionage Act is not constrained by the First Amendment because national security is the most compelling government interest.¹⁶⁶ The court refused to go so far in limiting the scope of the First Amendment, noting the "conduct at issue—collecting information about United States' foreign policy and discussing that information with government officials (both United States and foreign), journalists, and other participants in the foreign policy establishment—is at the core of the First Amendment's guarantees."¹⁶⁷ On the other hand, the court also did not apply the *Daily Mail* principle. Instead, the court adopted a totality of the circumstances test when balancing national security and the First Amendment.¹⁶⁸ Ultimately, because Rosen and Weissman disclosed classified national defense information the court held that "common sense and the relevant precedent point persuasively to the conclusion that the government can punish those outside of the government for the unauthorized receipt and deliberate retransmission of information relating to the national defense."¹⁶⁹ The precedent cited was language from the Pentagon Papers case discussed above.¹⁷⁰

If the Supreme Court is increasingly embracing a categorical inclusion for those who passively receive and publish previously undisclosed government information that was illegally obtained (as this Comment argues), and there is no strong basis for distinguishing between sensitive private information and government information when both are a matter of public concern, then *Rosen* was wrongly decided. Joe Bant points out that the *Rosen* decision "demonstrates

164. *See id.* at 625–27.

165. *Id.* at 625–26.

166. *See id.* at 629–30, 633–34.

167. *Id.* at 630.

168. *Id.* at 632.

169. *Id.* at 637.

170. *See id.* at 637–38.

the courts' willingness to enforce the Act against 'those not in a position of trust with the government.'"¹⁷¹ Bant continues, "[o]pening up the door for Espionage Act prosecutions of nongovernment officials effectively opens the door for using the Act to go after members of the media."¹⁷² Interestingly, on May 1, 2009 the government filed a motion to dismiss the indictment against Rosen and Weissman stating, "we have re-evaluated the case based on the present context and circumstances, and determined that it is in the public interest to dismiss the pending superseding indictment."¹⁷³ Given this reevaluation, the decision was not exposed to appellate scrutiny.

C. Despite the Recent Pushback on the *Daily Mail* Principle, Does *Bartnicki* Protect WikiLeaks from Civil or Criminal Liability?

As stated above, the answer to whether WikiLeaks is covered by *Bartnicki* depends on three things, if: (1) the information published by WikiLeaks is regarding a matter of public concern; (2) WikiLeaks did not actively participate in unlawful conduct other than the information's ultimate publication; and (3) *Bartnicki* applies to the government's right to keep all of its undisclosed information secret, instead of just the right to individual privacy. WikiLeaks meets the first two tests, and the third is yet to be decided.

For the reasons stated above, the Afghan War Diaries, Iraq War Logs, and Guantanamo prisoner dossiers contain information that is a matter of public concern. Regarding how WikiLeaks obtained this material, it seems unlikely that the government will be able to show that WikiLeaks actively participated in illegally obtaining the leaked information. Assange recently stated: "We've actually played inside the rules. We didn't go out and get the materials. We operated just like any U.S. publisher operated."¹⁷⁴ This statement suggests that WikiLeaks did not reach out to particular sources and ask them to illegally obtain information. Nevertheless, the government will likely argue that WikiLeaks, by virtue of providing and promoting its anony-

171. Joe Bant, Comment, United States v. Rosen: *Pushing the Free Press onto a Slippery Slope?*, 55 U. KAN. L. REV. 1027, 1028 (2007).

172. *Id.* at 1035.

173. Motion to Dismiss Superseding Indictment at 2, United States v. Rosen, 455 F. Supp. 2d 602 (E.D. Va. 2009) (No. 1:05CR225), 2009 WL 1162779.

174. Julian Assange, *The Man Behind WikiLeaks*, *supra* note 60.

mous uploading technology,¹⁷⁵ facilitated the illegal transmission of previously undisclosed government information, thus making WikiLeaks and Assange accomplices. The Internet makes it fast and easy for modern leakers to transmit government information to a global audience; Daniel Ellsberg by contrast photocopied by hand the 7000-page classified Pentagon Papers report.¹⁷⁶ Ultimately, under *Bartnicki* whether some form of aider and abettor liability will succeed depends on whether providing the WikiLeaks website and guaranteed anonymity is active or passive. WikiLeaks would argue that providing a website that promises confidentiality is no different from Yocum or Vopper's mailbox in *Bartnicki*.

Judge Posner takes the opposite position, arguing that *Bartnicki* provides no assistance to journalists who receive and publish classified information illegally obtained by a third party.¹⁷⁷ In Posner's view, such publishers are not protected by *Bartnicki* because "an accomplice is not 'law-abiding.'" ¹⁷⁸ Applying Judge Posner's understanding, to be protected by *Bartnicki* the publisher must have done nothing illegal short of publication. The government employee who leaked the government cables clearly acted illegally in transmitting the information. According to Posner, WikiLeaks is an accomplice to the government employee's crime by facilitating this transmission. Thus, WikiLeaks is an accomplice to a crime and not covered by *Bartnicki*. However, Judge Posner's assertion would rewrite the holding of *Bartnicki*¹⁷⁹ and is unlikely to prevail.

IV. *Snyder v. Phelps* Strengthens the Concept of Categorical Inclusion Suggested by *Bartnicki* for Matters of Public Concern

Snyder v. Phelps, protecting the "outrageous" speech of the Westboro Baptist Church ("WBC"),¹⁸⁰ is among the most controver-

175. See, e.g., *Submissions*, WIKILEAKS, <http://www.wikileaks.org/Submissions.html> (last visited Jan. 31, 2012). WikiLeaks informs potential information submitters that "[o]ur drop box is easy to use and provides military-grade encryption protection." *Id.*

176. *The Most Dangerous Man in America in Context: Daniel Ellsberg and the Pentagon Papers*, PBS POV, http://www.pbs.org/pov/mostdangerousman/photo_gallery_background.php (last visited Jan. 31, 2012).

177. See POSNER, *supra* note 39, at 108–09.

178. *Id.* at 108.

179. Judge Posner clearly misreads the holding of *Bartnicki*—the media is protected as long as they do nothing illegal short of publication—by stating that if the information's source does something illegal to leak the information, the media is an accomplice by taking the information. See *id.*; *Bartnicki v. Vopper*, 532 U.S. 514, 535 (2001).

180. *Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (2011).

sial Supreme Court decisions of the last session. In the decision, the Court embraced a broad definition of matter of public concern:

Speech deals with matters of public concern when it can “be fairly considered as relating to any matter of political, social, or other concern to the community,” or when it “is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.”¹⁸¹

To determine if speech is of private or public concern, courts must consider “content, form, and context of that speech, as revealed by the whole record.”¹⁸² The Court continued, “[i]n considering content, form, and context, no factor is dispositive, and it is necessary to evaluate all the circumstances of the speech, including what was said, where it was said, and how it was said.”¹⁸³

The Snyder family sued the WBC for protesting the military funeral of their son and causing them great emotional distress.¹⁸⁴ The WBC held signs that read “God Hates the USA/Thank God for 9/11,” “America is Doomed,” “Fag Troops,” “Thank God for Dead Soldiers,” “Pope in Hell,” and “You’re Going to Hell.”¹⁸⁵ The issue posed to the Court was whether private person plaintiffs are required to prove actual malice in order to get damages for their claim of intentional infliction of emotional distress when the subject of the speech was a matter of public concern. Nevertheless, the Court’s opinion fails to discuss actual malice at all, noting that the WBC could not be punished for their speech, because it was on a matter of public concern.¹⁸⁶ The Court did not use the traditional balancing test to decide the case, suggesting that, at least for intentional infliction of emotional distress, the key factor was whether or not the speech at issue is about a private or public issue.¹⁸⁷ In this way, the opinion suggests that the Court is *categorically including* speech about matters of public concern into the realm of First Amendment protection.

Indeed, the Court held that its definition of what constitutes a matter of public concern is broad enough to encompass WBC’s offen-

181. *Id.* at 1216 (citations omitted) (quoting *Connick v. Myers*, 461 U.S. 138, 146 (1983); *City of San Diego v. Roe*, 543 U.S. 77, 83–84 (2004)).

182. *Id.* (internal quotation marks omitted) (citing *Dun & Broadstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 761 (1978)).

183. *Id.*

184. *Id.* at 1213.

185. *Id.* at 1216–17.

186. *See id.* at 1219 (“Given that Westboro’s speech was at a public place on a matter of public concern, that speech is entitled to ‘special protection’ under the First Amendment.”).

187. *Id.*

sive slogans.¹⁸⁸ The Court recognized, “[w]hile these messages may fall short of refined social or political commentary, the issues they highlight—the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy—are matters of public import.”¹⁸⁹

Before *Snyder*, what constituted a matter of public concern was less clear. Scholars were concerned that the doctrine privileged political speech to the detriment of other core First Amendment speech: “The public-concern test arguably puts in constitutional jeopardy First Amendment protection of art, entertainment, scientific speech, and any other category of speech not directly related to self-government. It also, quite undemocratically, leaves the judiciary with the task of deciding what is and is not relevant to public discourse.”¹⁹⁰ Now the opposite concern seems valid: what speech is *not* a matter of public concern? The Court announced its rule as though it was embedded in precedent, but really, this expansive reading of matter of public concern is quite new and has potentially far-reaching implications for First Amendment jurisprudence.

One such implication is that the information published by WikiLeaks should be categorically sheltered under the expansive umbrella provided by the *Snyder v. Phelps* definition of matter of public concern. WikiLeaks publishes information about matters of public concern, informing potential submitters that it accepts “restricted or censored material of political, ethical, diplomatic or historical significance.”¹⁹¹

The Guantanamo Bay prisoner dossiers, diplomatic cables regarding the wars in Afghanistan and Iraq, and Collateral Murder video provide U.S. citizens with the information necessary to make informed opinions about our nation’s foreign policy and our government’s day-to-day performance. It is hard to think of topics that better fit the definition of public concern. As discussed above, WikiLeaks did not illegally obtain the truthful information it published. Furthermore, since *Snyder*’s expansive definition of matters public concern easily encompasses all of WikiLeaks’ disclosures of government information, WikiLeaks should be constitutionally protected.

188. *Id.*

189. *Id.*

190. Matthew J. Coleman, *The “Ultimate Question”: A Limited Argument for Trafficking in Stolen Speech*, 55 OKLA. L. REV. 559, 586 (2002).

191. *Submissions*, *supra* note 175.

V. The Few Existing War on Terror Cases Suggest Limitations on the Special Protection for Speech Regarding Matters of Public Concern

Despite recent United States involvement in two wars, somewhat bizarrely, few published cases involve courts struggling with the tension between the First Amendment and government attempts to squelch social protest related to the War on Terror. Nevertheless, two recent cases, *Holder v. Humanitarian Law Project* and *Weiss v. Casper*, merit discussion because they give little deference to speech regarding a matter of public concern. Such a result disregards a key purpose of the First Amendment: checking government power. The results are ironic considering the Court's willingness to privilege the WBC's extreme speech because it is focused on public issues, although WBC's speech caused great distress to a private family and arguably lacks the capacity to serve as an effective challenge to government policy.

A. *Holder v. Humanitarian Law Project*

In *Holder v. Humanitarian Law Project*, the Court held that the government can constitutionally restrict the expressive association rights of academics who "knowingly provide material support" to terrorists through speech (training, engaging in political advocacy, etc.) that advances the groups' legitimate activities.¹⁹² The Court claimed to use strict scrutiny but basically subjected the statute to rational basis scrutiny, deferring to the consensus reached by Congress and the Executive.¹⁹³ Moreover, the Court defines national security broadly as "the national defense, foreign relations, or economic interests of the United States."¹⁹⁴ It nonetheless ignores the lofty language of the *Daily Mail* principle and conflicts with the Court's later decision in *Snyder* regarding First Amendment protection for all matters of public concern. *Holder* thus suggests that when it comes to speech that has the potential to impact policy, the Court is less willing to embrace a categorical approach.

B. *Weise v. Casper*

In *Weise v. Casper*, the plaintiffs attended a speech by President Bush, given in his official capacity as President of the United States.¹⁹⁵

192. *Holder v. Humanitarian Law Project*, 130 S. Ct. 2705, 2726–30 (2010).

193. *See id.* at 2723–24, 2727–30.

194. *Id.* at 2713.

195. *Weise v. Casper*, 593 F.3d 1163, 1165 (10th Cir. 2010).

Plaintiff Weise's car, which she drove to the event, sported a "No More Blood for Oil" bumper sticker.¹⁹⁶ Volunteers admitted plaintiffs because they met all of the qualifications for entry (obtaining tickets from their congressman after showing their driver's licenses and writing down their names). Nevertheless, they were soon "escorted from the event and not allowed to reenter. . . . because of the bumper sticker on Ms. Weise's vehicle."¹⁹⁷ Further, "being publicly and prominently ejected from the audience in this manner caused extreme embarrassment and humiliation to the [p]laintiffs."¹⁹⁸ The plaintiffs did not, nor did they intend to, disrupt the event; rather they were removed solely because of the political speech appearing on Ms. Weise's vehicle.¹⁹⁹

The Tenth Circuit held that the right of silent attendees not to be ejected from a presidential speech, based on a dissenting opinion displayed on a bumper sticker on their car, was not clearly established at time of the violation and granted the government volunteers qualified immunity: "Although Defendants ejected them from the event, [p]laintiffs have identified no authority suggesting that mere attendance is transformed into speech or even expressive activity because of their speech elsewhere."²⁰⁰

As pointed out by the dissent, the court gave no deference to the fact that the bumper sticker expressed an opinion about a matter of public concern—criticism of the government's war policy.²⁰¹ If "God Hates the USA/Thank God for 9/11" is seemingly categorically protected by the First Amendment in *Snyder* because it is a matter of public concern,²⁰² then it is difficult to distinguish Ms. Weise's "No More Blood for Oil" bumper sticker.

Overall, these two War on Terror cases point out that courts may be reluctant to protect speech under the First Amendment when that speech comes from people with more potential to sway public opinion than WBC. Nonetheless, this reluctance to fully embrace a categorical approach for all matters of public concern broadly defined makes sense. The *Daily Mail* principle is a fledging doctrine supported primarily by the public's need to have access to information that is vital to

196. *Id.*

197. *Id.*

198. *Id.* at 1172 (Holloway, J., dissenting).

199. *Id.* at 1165 (majority opinion).

200. *Id.* at 1169.

201. *Id.* at 1170–71 (Holloway, J. dissenting).

202. *Snyder v. Phelps*, 131 S. Ct. 1207, 1216 (2011).

the health of our democracy, not protecting every statement that is tangentially public-focused.

As far as WikiLeaks is concerned, the speech at issue is more clearly protected, as publishing the leaked diplomatic cables and Guantanamo prisoner dossiers is the bread and butter of the *Daily Mail* principle—protecting publishers of previously undisclosed government information that was illegally obtained by a source and about a matter of public concern.

Conclusion

This Comment has suggested that the government, in its conflict with WikiLeaks will be unable to impose a prior restraint on future publications of undisclosed government information or successfully prosecute Assange under the Espionage Act. This is primarily because publishers receive heightened First Amendment protection on matters of public concern, what this Comment has called a “categorical inclusion” into the First Amendment. The concept of a categorical inclusion stems from the Supreme Court’s decision in *Bartnicki v. Vopper*, the most recent in the *Daily Mail* line of cases and is strengthened through the Court’s recent expansion of the definition of what constitutes a matter of public concern in *Snyder v. Phelps*.

Such a rule provides clarity to publishers, thus eliminating otherwise likely chilling effects on speech: “Clear rules are essential in the realm of free speech, and that is one reason why we grant the government so much authority to restrict the speech of its own employees.”²⁰³ Furthermore, revealing government secrets can serve as an effective check on government power: “Publication of information pertaining to national defense sheds light on the inner workings of government, promotes self-governance, and provides an important check on government malfeasance and abuse.”²⁰⁴

Robust First Amendment protection for matters of public concern requires the government to avoid punishing publishers. Instead, the government is encouraged to more aggressively prosecute leakers or restrict access to sensitive information to keep its secrets confidential. For example, in response to the WikiLeaks releases, the Obama administration recently issued an executive order tightening access to

203. *Espionage Act Hearing*, *supra* note 41, at 8 (statement of Geoffrey R. Stone, Professor & Former Dean, Univ. of Chi. Law Sch.).

204. Derigan A. Silver, *National Security and the Press: The Government’s Ability to Prosecute Journalists for the Possession or Publication of National Security Information*, 13 COMM. L. & POL’Y 447, 472–73 (2008).

the government's classified networks to prevent future leaks.²⁰⁵ The executive order provides for agency auditing systems and an inter-agency Insider Threat Task Force that will be responsible for "detering, detecting, and mitigating insider threats, including the safeguarding of classified information from exploitation, compromise, or other unauthorized disclosure"²⁰⁶ While this response is antithetical to transparency, it is constitutionally preferable to the government prosecuting publishers. Moreover, this response is a sign that the Obama administration recognizes its constitutional limitations in this area.

We cannot simply defer to the government about the possible harms from publication of previously undisclosed government information, as these harms are likely to be exaggerated. As mentioned above, there is a serious problem of over-classification: "[T]here are great pressures that lead both government officials and the public to overstate the potential harm of publication in times of national anxiety."²⁰⁷

Overall, a categorical protection for publishers of previously undisclosed government information is necessary in order to do justice to the First Amendment. As Assange noted:

It will be encouragement to every other publisher to publish fearlessly. . . . If we're talking about creating threats to small publishers to stop them from publishing, the U.S. has lost its way. It has abrogated its founding traditions. It has thrown the First Amendment in the bin. Because publishers must be free to publish.²⁰⁸

205. Exec. Order No. 13,587, 76 Fed. Reg. 63,811 (Oct. 7, 2011).

206. *Id.* § 6.1.

207. *Espionage Act Hearing*, *supra* note 41, at 8 (statement of Geoffrey R. Stone, Professor & Former Dean, Univ. of Chi. Law Sch.).

208. Julian Assange, *The Man Behind WikiLeaks*, *supra* note 60.